

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>RAD ENERGY CORPORATION</b>	:	DETERMINATION
	:	DTA NO. 818452
for Revision of a Determination or for Refund of Motor	:	
Fuel Tax Under Article 12-A of the Tax Law for the	:	
Period January 1, 1998 through April 20, 1998.	:	

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Petitioner, RAD Energy Corporation, c/o Carl S. Levine & Associates, P.C., 1800 Northern Boulevard, Roslyn, New York 11576, filed a petition for revision of a determination or for refund of motor fuel tax under Article 12-A of the Tax Law for the period January 1, 1998 through April 20, 1998.

On July 20, 2001, the Division of Taxation filed a motion for an order dismissing the petition and granting summary determination to the Division of Taxation on the ground that there are no material issues of fact and that the facts mandate a determination in favor of the Division of Taxation. Petitioner filed an affidavit in opposition to the motion and, in the alternative, a cross motion for summary determination on August 16, 2001. The Division of Taxation appeared by Barbara G. Billet, Esq. (John E. Matthews, Esq., of counsel). Petitioner appeared by Carl S. Levine, Esq. Based on the pleadings, motion papers, affidavits and documents submitted, Jean Corigliano, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether the Tax Law provides authority to grant petitioner's application for a refund of prepaid motor fuel tax based upon a bad debt.

***FINDINGS OF FACT***

1. The parties agree that there are no material facts in dispute.
2. During the relevant period, petitioner, Rad Energy Corporation, was registered as a motor fuel and diesel motor fuel distributor pursuant to sections 282 and 283 of the Tax Law and as a petroleum business as defined in section 300(b) of the Tax Law.
3. RAD sold 2,587,692 gallons of diesel fuel and gasoline to Bayview Fuel Oil, Inc. (“Bayview”) from January 1998 through April 1998 (the “Bayview gallons”). All of the fuel was delivered directly to retail service stations in New York State.
4. As required by the Tax Law and regulations, RAD included the Bayview gallons on its petroleum business tax returns and paid all motor fuel and petroleum business taxes imposed under articles 12-A and 13-A of the Tax Law.
5. Bayview failed to pay RAD for the Bayview gallons and also failed to pay the related motor fuel, petroleum business and sales taxes on those gallons.
6. RAD subsequently determined that the Bayview account was uncollectible as defined in section 534.7(a)(1) of the sales tax regulations of the Division of Taxation (“Division”).
7. RAD took a deduction for the Bayview bad debts on its Federal income tax returns, Form 1120S, for 1998. Bayview filed a Petition in Bankruptcy under Chapter 11 in the Eastern District of New York on April 26, 1999 and listed RAD as one of its 20 largest unsecured creditors.
8. RAD timely submitted a motor fuel tax refund application to the Division on January 31, 2001 requesting a refund of motor fuel taxes in the amount of \$207,015.46, all of which relates to the taxes paid on the Bayview gallons.

9. RAD's claim for a refund of motor fuel taxes was denied in its entirety. In a letter dated March 14, 2001, the Division set forth the basis for its denial of the refund application as follows: "The reason for the denial is because Article 12-A does not contain a provision to allow a distributor a credit or refund for prepaid motor fuel tax where the distributor is not paid by the customer for the motor fuel."

10. On its Reports of Sales Tax Prepayment of Motor Fuel/Diesel Motor Fuel, RAD took bad debt credits for prepaid sales taxes on motor fuel and diesel motor fuel totaling \$251,764.91 for the months of January through March 2000. These bad debt credits also related to the Bayview gallons. The Division granted the prepaid sales tax credits.

#### ***SUMMARY OF THE PARTIES' POSITIONS***

11. The Division does not challenge the factual basis of petitioner's refund claim, that the Bayview debt has become uncollectible. Rather, it takes the position that there is no provision in the Tax Law or regulations for a refund based on a bad debt. Furthermore, the Division argues that this issue was settled by the Tax Appeals Tribunal in ***Matter of New York Fuel Terminal Corporation*** (Tax Appeals Tribunal, February 12, 1998 [hereafter, "***NYFT 1998***"]) where the Tribunal upheld an Administrative Law Judge's finding that there was no statutory authority for a taxpayer to receive a credit for prepaid motor fuel tax.

12. Petitioner relies on the rationale of an earlier case, ***Matter of New York Fuel Terminal Corporation*** (Tax Appeals Tribunal, October 26, 1995), which held that a registered distributor is entitled to a bad debt credit for prepaid sales taxes on motor fuel despite the lack of explicit statutory authority for such a credit. Petitioner takes the position that ***NYFT1998*** is not binding precedent because the legal holding was tainted by the felonious conduct of the

petitioner's corporate principals and because denial of the credit was based on a finding that the debts were not shown to be uncollectible.

### ***CONCLUSIONS OF LAW***

A. To obtain summary determination, the moving party must submit an affidavit, made by a person having knowledge of the facts, a copy of the pleadings and other available proof. The motion shall be granted if the documents show that there is no material issue of fact and that the facts mandate a determination in the moving party's favor (20 NYCRR 3000.9[b][1]).

B. Petitioner submitted the affidavit of Carl S. Levine and documentation to establish that the Bayview account is an uncollectible bad debt as that term is defined in section 534.7(a)(1) of the Division's sales tax regulations. The Division did not dispute the facts as set forth by Mr. Levine in his affidavit; therefore, it may be concluded that there is no material issue of fact in dispute. The only issue then is whether the Tax Law allows petitioner to take a credit against its motor fuel tax liability for the Bayview bad debt.

C. I agree with the Division that the Tax Law does not allow for such a credit. In *NYFT1998*, the Tax Appeals Tribunal held that the Tax Law does not contain any provision which would allow a bad debt credit for taxes imposed under Article 12-A of the Tax Law. Contrary to petitioner's claims, the facts of its case are not distinguishable from the facts found in *NYFT1998* and the holding of *NYFT1998* is binding precedent in this proceeding. In *NYFT1998*, the Tax Appeals Tribunal adopted all of the findings of fact of the Administrative Law Judge's Determination and affirmed her determination, without discussion, based on the reasoning found in that determination. Consequently, it is appropriate to look to the facts and rationale of the Administrative Law Judge's Determination to decide whether the opinion in *NYFT1998* controls the outcome of this proceeding.

Petitioner argues that the holding in *NYFT1998* was based, in part, on the Tribunal's conclusion that the petitioner had not shown that the debts in issue were bona fide bad debts. There is no basis for this claim. The Administrative Law Judge in *Matter of New York Fuel Terminal Corporation* (Administrative Law Judge Determination, February 20, 1997), found that the underlying debt that gave rise to the petitioner's application for a credit of motor fuel tax was an uncollectible debt pursuant to section 534.7(a)(1) of the Division's sales tax regulations, and the Tribunal adopted this conclusion. The debt in question consisted of the unpaid obligation of Tunyung Oil Corporation ("Tunyung") for March and April 1988 motor fuel sales. The Division explicitly argued that "petitioner did not follow the procedures to establish that the debt was uncollectible" (*id.* at p. 15). The Administrative Law Judge found that the Tunyung debt was the subject of a prior decision of the Tax Appeals Tribunal (*Matter of New York Fuel Terminal Corp.*, Tax Appeals Tribunal, October 26, 1995) where "[t]he Tribunal established that the Tunyung account for the March and April 1988 motor fuel sales was an uncollectible bad debt" (*id.*, at p. 22). At the urging of the petitioner, the Administrative Law Judge applied the doctrine of collateral estoppel and concluded that the prior Tax Appeals Tribunal decision established that the Tunyung debt was an uncollectible bad debt. In its affirmance, the Tribunal did not reject this conclusion of the Administrative Law Judge. Accordingly, petitioner's assertion that the Tribunal found that the petitioner had failed to prove that the amounts in question were uncollectible as bad debt is without any foundation.

D. Petitioner argues that the *NYFT1998* opinion did not give sufficient weight to the interrelationship between Article 12-A of the Tax Law and Article 28 of the Tax Law. Since Article 28 provides a credit for bad debt for prepaid sales tax on motor fuel (*Matter of New York Fuel Terminal Corp.*, *supra*), petitioner argues that the same credit must be allowed for the

prepaid excise tax on motor fuel. It relies on Tax Law §§ 289-f and 1142(11) as support for its contention that the statutory provisions providing for joint administration of the motor fuel and sales taxes require that the refund provisions of the sales tax law (Tax Law § 1132[e];§ 1139) be applied to motor fuel tax. This same argument was considered and rejected by the Tribunal in *NYFT1998* based on the following reasoning of the Administrative Law Judge:

Petitioner argues that the Tribunal's holding in *Matter of New York Fuel Terminal* with respect to prepaid sales tax on motor fuel is readily applicable to prepaid motor fuel tax under Article 12-A. Petitioner also relies on Tax Law § 289-f as authority for the proposition that prepaid motor fuel tax, like prepaid sales tax on motor fuel, is subject to credit or refund when the tax is uncollectible as a bad debt.

Section 289-f of Article 12-A, entitled "Joint administration of taxes", provides that the tax commission has the authority to make regulations for the joint administration of taxes imposed under Articles 12-A, 28 and 29 upon the sale of motor fuel including the reporting and refunding of such taxes. As noted by the Division's counsel, the legislative intent underlying the enactment of section 289-f was to simplify the administration of State and local taxes, aid in the detection of untaxed gasoline and "to provide for the joint administration of the motor fuel and sales and compensating use taxes and the filing of motor fuel tax returns on the twentieth day of a month, the due date of the sales tax returns" (Executive Dept. Mem, 1985 McKinney's Session Laws of NY, at 2955 - 2956).

The Tribunal, in its holding in *New York Fuel Terminal*, relied on sections 1102 and 1132(e) in Article 28 of the Tax Law. Section 1132(e) specifically permits a vendor a credit against sales tax due on a subsequent tax return for sales tax paid on items that have been returned or when the customer has not paid for the item and the charge has been ascertained to be uncollectible. The Tribunal reasoned that section 1132(e) applied to motor fuel distributors because section 1102 indicates that the provisions of Article 28 are intended to apply to the tax required to be prepaid pursuant to section 1102(a) unless the provision is inconsistent or not relevant to the prepaid tax.<sup>1</sup>

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<sup>1</sup>Section 1102(b) provides that prepaid sales tax on motor fuel shall be administered and collected in a like manner as the imposition of sales and use taxes under sections 1105 and 1110. Section 1102(b) also provides, in pertinent part, that:

"Such provisions shall apply with the same force and effect as if the language of those provisions have been set forth in full in this section except to the extent that any provision is either inconsistent with a provision of this section or is not relevant to the tax required to be prepaid by this section."

The Tribunal found that a credit for bad debts is not inconsistent or irrelevant to the prepaid tax. The Tribunal reasoned that

"[t]he distributor who is required to prepay the tax but who has not been paid by his customer is in the same economic position as the retail vendor who has paid over the sales tax to the Division but who has not been paid by his customer. The distributor and retail vendor are each required to pay the tax to the Division and are required to collect the tax from their customer (Tax Law §§ 1102[c] and 1132[a]; *see also*, 20 NYCRR 561.1[b][1]). If the customer does not pay, the distributor and the retail vendor are each left bearing the burden of the tax contrary to the scheme intended by Article 28. Thus, in each case the credit for bad debts would act to remove a tax burden which has come to rest in the inappropriate place in the chain of transactions."

In contrast to this taxing scheme under Article 28, there are no comparable provisions under Article 12-A to justify a credit for a bad debt with respect to prepaid motor fuel tax. Article 12-A does not contain a provision to allow a distributor to obtain a credit or refund for prepaid motor fuel tax where the distributor is not paid by the customer for the motor fuel. Moreover, section 289-f, under Article 12-A, does not provide authority (as does section 1102[b] with respect to prepaid sales tax for motor fuel) that the provisions of Article 28 apply to those of Article 12-A. Therefore, there is no statutory authority for petitioner to receive a credit for prepaid motor fuel tax.

E. Finally, petitioner argues that the holding in *NYFT1998* was tainted by the Tribunal's knowledge that the corporate principals of New York Fuel Terminal Corporation had been convicted of Federal tax evasion and of defrauding the government in the collection of Federal gasoline excise tax. There is no evidence in either the Administrative Law Judge Determination or the Tax Appeals Tribunal Decision that the conduct of the corporate principals had an effect on the outcome of the case.

F. The motion of the Division of Taxation is granted; its denial of petitioner's claim for credit or refund is sustained; and the petition of RAD Energy Corporation is denied.

DATED: Troy, New York  
October 4, 2001

/s/ Jean Corigliano  
ADMINISTRATIVE LAW JUDGE